



September 11, 2001

Mr. Stephen R. Zastrow  
Legal Advisor  
Corpus Christi Police Department  
321 John Sartain  
Corpus Christi, Texas 78401

OR2001-4027

Dear Mr. Zastrow:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151853.

The Corpus Christi Police Department (the "department"), which you represent, received a request for "all documents" regarding "a well published case against Assistant Chief Lou Villagomez involving a lady whom he tried to entice into a hotel room." You state that another request for the same information was received by the department five years ago. You inform us that both requestors were informed that the requested records had "been purged" according to city policy and record retention laws, and therefore no longer existed. You inform us that subsequently, responsive information was uncovered in an "unused file designated 'Pending Open Records Requests.'" You therefore seek a ruling as to whether the responsive information must be released. You claim that the responsive information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code, as well as under common law privacy. We have considered the exception you claim and reviewed the submitted information.

First, we note that, pursuant to section 552.301(b) of the Government Code, a governmental body must ask for an attorney general's decision and state the exceptions that apply no later than the tenth business day after the date of receiving the written request. The department failed to request a decision within the ten business day period as required by section 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You argue that the requested information is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 of the Government Code provides a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Therefore, we will address your assertions.

We note that section 552.022 of the Government Code makes certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. Gov't Code § 552.022. Section 552.022 states in relevant part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

Gov't Code § 552.022. One such category of expressly public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108...." Gov't Code § 552.022(a)(1). Some of the submitted documents are records related to a completed investigation undertaken by the city police department's Internal Affairs Division. Therefore, as prescribed by section 552.022, the submitted information must be released to the requestor unless it is confidential under another law or excepted from disclosure under section 552.108. Section 143.089 is "other law" for purposes of section 552.022. Therefore, we will address your argument under section 143.089 in conjunction with section 552.101 of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by statute. You state that Corpus Christi is a civil service city pursuant to chapter 143 of the Local Government Code. Chapter 143 contemplates two different types of personnel files, one that the civil service director or designee is required to maintain as part of the police officer's civil service file, and one that a police department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). Section 143.089 of the Local Government Code provides in pertinent part:

(a) The director or the director's designee shall maintain a personnel file on each . . . police officer. The personnel file must contain *any* letter, memorandum, or document relating to:

(1) a commendation, congratulation, or honor bestowed on the . . . police officer by a member of the public or by the employing department for an action, duty, or activity that relates to the person's official duties;

(2) any misconduct by the . . . police officer if the letter, memorandum, or document is from the employing department and *if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter*; and

(3) the periodic evaluation of the fire fighter or police officer by a supervisor.

....

(g) A . . . police department may maintain a personnel file on a . . . police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a . . . police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the . . . police officer's personnel file.

Local Gov't Code § 143.089(a), (g) (emphasis added).

Section 143.089(b) of the Local Government Code specifically prohibits information regarding alleged misconduct from being placed in the officer's civil service file "if the employing department determines that there is insufficient evidence to sustain the charge of misconduct." *Id.* §143.089(b). The only information regarding misconduct that is to be placed in the civil service file is that which relates to "misconduct [that] resulted in disciplinary action by the employing department." Local Gov't Code § 143.089(a)(2); *see also* Local Gov't Code §§ 143.051-.055 (describing "disciplinary action" for purposes of section 143.089(a)(2)). Section 143.089(a) contains an exclusive list of the documents that must be maintained in the director's personnel file. Attorney General Opinion JC-0257 (2000).

Information that reasonably relates to an officer's employment relationship with the police department and that is maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. San*

*Antonio Express-News*, No. 04-99-00848-CV, 2000 WL 1918877 (Tex. App.--San Antonio Dec. 20, 2000, no pet. h.); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied).

You state that "while the records indicate a disciplinary action was taken, the city legal department informs us that the contemplated discipline was never imposed. The instant records were kept until purged in the permissive personnel file and were never in the civil service file." You further state that "[t]he information the requester [sic] seeks was generated during an Internal Affairs Department investigation that did not result in disciplinary action. Therefore, it was not filed in the civil service file . . . ." Based on your representations that no disciplinary action has been imposed, we agree that you must withhold the information you have designated as "Exhibit A, Records From Department Personnel File" under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. *See* Open Records Decision No. 552 (1990) (where fact issues are not resolvable as a matter of law or ascertainable from face of documents submitted for our inspection, we rely on representations of governmental body requesting ruling). In light of this conclusion, we need not address your argument under common law privacy.

We also note that you have submitted information as responsive to the request that you have labeled "Exhibit B, Records From Permanent Personnel File." As you have labeled these separately from the information contained in the department's personnel file, we assume that you do not seek to withhold this information under section 143.089(g). Therefore, if in fact the information in Exhibit B is not in the department's personnel file subject to section 143.089(g), then this information must be released to the requestors, with the following exception. The submitted documents in Exhibit B contain information excepted from disclosure under section 552.117 of the Government Code. Section 552.117(2) excepts from required public disclosure information relating to the home address, home telephone number, and social security number of a peace officer as defined by article 2.12 of the Code of Criminal Procedure, as well as whether the peace officer has family members. We have marked the information in Exhibit B that must be withheld under section 552.117(2). The remainder of the submitted information in Exhibit B must be released to the requestor.

To summarize, the information in Exhibit A is confidential under section 143.089(g) of the Local Government Code, and therefore may be withheld in its entirety under section 552.101. Provided it is not in the department's personnel file, the information in Exhibit B must be released to the requestors, with the exception of the information we have marked to be withheld under section 552.117(2).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited

from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

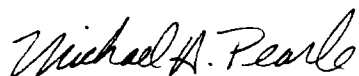
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref.: ID# 151853

Enc.: Submitted documents

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